BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

AMY V. REITER	)	
Claimant	)	
	)	
VS.	)	
	)	
STATE OF KANSAS	)	
Respondent	)	Docket Nos. 1,009,450 &
	)	1,030,997
AND	)	
	)	
STATE SELF INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Both claimant and respondent and its insurance carrier (respondent) requested review of the Review and Modification Award entered by Administrative Law Judge Bruce E. Moore on February 19, 2009, in Docket No. 1,009,450. Claimant further appeals the Award entered by Administrative Law Judge Bruce E. Moore on February 19, 2009, in Docket No. 1,030,997. The Board heard oral argument on June 19, 2009. James S. Oswalt, of Hutchinson, Kansas, appeared for claimant. E.L. Lee Kinch, of Wichita, Kansas, appeared for respondent.

In Docket No. 1,009,450, the Administrative Law Judge (ALJ) found upon review and modification that claimant was permanently and totally disabled as a result of her injury of October 26, 1999. Claimant was, accordingly, awarded permanent total disability compensation at the rate of $269.73 per week not to exceed $125,000. Respondent was allowed a credit for the amount of temporary total and permanent partial disability compensation claimant was previously paid in Docket No. 1,009,450, as well as for the temporary total disability compensation claimant was paid in Docket No. 1,030,997.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant requests review of the ALJ's findings that she failed to prove she suffered a new injury on August 8, 2006, that she failed to provide respondent with timely notice of her alleged injury of August 8, 2006, and that the deterioration of her condition represented the natural and probable consequence of her 1999 injury. Although claimant's application for review lists an issue concerning the amount of compensation due in Docket No. 1,009,450, that issue was not mentioned in her brief to the Board.

Respondent requests that the ALJ's Award denying claimant workers compensation benefits in Docket No. 1,030,997 be affirmed. In regard to Docket No. 1,009,450, respondent argues that claimant is not permanently totally disabled. Further, respondent contends that claimant did not prove an increase in her functional disability or that she is entitled to a work disability. In the alternative, if the Board finds that claimant is entitled to a work disability, no work disability award should be effective until October 17, 2008, the date of Dr. Paul Stein's latest restrictions.

The issues for the Board's review are:

(1) Did claimant prove she sustained a new accident and injury on August 8, 2006, that arose out of and in the course of her employment with respondent, or is her current condition a natural and probable consequence of her previous accident of October 26, 1999?

(2) If claimant's current condition is a result of a new and separate injury of August 8, 2006, did claimant provide respondent with timely notice of her alleged August 8, 2006, accident?

(3) What is the nature and extent of claimant's disability in both docketed claims?

(4) In the event the Board finds claimant is permanently and totally disabled as a result of her injuries in the October 26, 1999, accident, did the ALJ correctly compute the amount of compensation due claimant?

FINDINGS OF FACT

On October 26, 1999, claimant was working for respondent as a juvenile corrections officer. She was injured on that date when a juvenile resident of the correctional facility kicked her in her left knee. She was taken to the hospital and was off work two days. She was referred to Dr. Michael Johnson, who ordered an MRI that showed claimant had a possible torn anterior cruciate ligament (ACL). On December 8, 1999, Dr. Johnson performed surgery on claimant's left knee to repair her ACL. Claimant was sent to physical therapy after her surgery, but her knee pain worsened. She was diagnosed with complex

regional pain disorder. She also began having low back pain as a result of her altered gait.

Claimant returned to work in June 2000, with restrictions. She continued being treated by various physicians for her left knee and low back conditions, undergoing a myriad of treatments, including lumbar sympathetic blocks, lumbar epidural steroid injections, and nerve root blocks. She also underwent testing, including MRI's, x-rays, discogram, CT scan, EMG and nerve conduction studies. In March 2002, she was referred to Dr. Alan Moskowitz, who diagnosed her with degenerative disc disease. On June 12, 2002, Dr. Moskowitz performed a fusion to her low back from L4 to S1, with instrumentation.

Claimant testified that her low back and left leg conditions worsened after her surgeries. She returned to work at respondent as a juvenile corrections officer on September 23, 2002, with lifting restrictions from Dr. Moskowitz. She continued having worsening pain in her low back, left leg and left knee. She had left nerve root blocks performed by Dr. Michael Mueller in September 2003 and January 2004 and continued to have testing in the form of an EMG, myelogram and CT scan. On or about February 19, 2004, claimant was laid off by respondent because she was unable to perform the duties of a juvenile corrections officer.

On March 17, 2004, claimant was seen by Dr. Pedro Murati, an independent medical examiner, at the request of claimant's attorney. He diagnosed claimant with left knee pain status post-ACL reconstruction with patella tendon graft and low back pain secondary to posterior lumbar interbody fusion at L4-5 and L5-S1. He said that claimant had developed complex regional pain disorder in her left lower extremity and also that claimant's low back condition was a result of a limp she had after her knee injury and surgery. Using the AMA *Guides*,[1] he rated claimant as having a 25 percent permanent partial impairment to the body as a whole for her low back and a 23 percent permanent partial impairment to her left lower extremity, which he converted to a 9 percent whole person impairment. Using the Combined Values Chart, he found she had a total functional impairment of 32 percent. He also found that claimant had a 50 percent task loss after reviewing a job task list prepared by Jerry Hardin and concluding that claimant was unable to perform 16 of the 32 tasks on his list.

After Dr. Murati's independent medical examination of claimant, he was authorized to be her treating physician to manage her pain. He provided her with prescriptions for pain medication and also gave her Synvisc injections in her left knee and Botox blocks for her low back. She obtained a secretarial/sales job with Bell Memorial in November 2004, however the job did not work out and her last day with Bell Memorial was on December 23, 2004.

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

On January 26, 2005, claimant was evaluated by Dr. Philip Mills, who is board certified in physical medicine and rehabilitation, as well as being a board certified independent medical examiner, at the request of respondent. After examining claimant, he rated her as having a 10 percent permanent partial impairment to the whole body for her low back and a 3 percent permanent partial impairment to the whole body for her left lower extremity injury. These combined for a 13 percent permanent partial impairment, which he rounded up to 15 percent. Dr. Mills reviewed a task list prepared by Karen Terrill and opined that of the 39 tasks on the list, claimant was unable to perform 15 for a task loss of 38 percent.

Claimant returned to work for respondent on March 7, 2005, having accepted a lower-paying position as an office assistant. She was first assigned duties in the facility's commissary. She testified that job involved bending, kneeling, climbing ladders, and standing on a cement floor for up to eight hours a day. About August 2005, she was moved from the commissary to a job as an administrative assistant in the facility's library. The library job was more accommodating to her restrictions than was the commissary job. During this time, she continued being seen by Dr. Murati for prescriptions, Synvisc injections and Botox injections. Claimant's supervisor, Katrina Pollett, testified that during this period, she at times observed claimant riding a Ninja cycle to work during nice weather. She wondered how claimant was able to ride that type of motorcycle when she allegedly had back issues. Ms. Pollett also testified that she saw claimant running in high-heeled shoes while at work.

On November 23, 2005, the ALJ entered an Award in Docket No. 1,009,450, finding that claimant had a 10 percent permanent partial impairment to her low back and a 10 percent permanent partial impairment to her left lower extremity, which converted to a 3 percent impairment to the body as a whole, for a combined rating of 14 percent. This award was modified by the Board on March 31, 2006, when it found that claimant was entitled to an award of 25 percent permanent partial impairment to the whole body.

On March 14, 2006, claimant was seen by Dr. Paul Stein, a board certified neurosurgeon, at the request of respondent. He was asked to provide an opinion as to the nature of claimant's injury and recommendations relative to treatment. After his examination, Dr. Stein concluded that claimant had sustained an injury to her left knee. He had no recommendations as to additional treatment for her knee, although he found that she had some residual symptoms related to degenerative changes in her knee. As far as claimant's low back and left lower extremity condition, he stated he did not agree with the diagnosis of complex regional pain disorder but, instead, diagnosed her as having a nonspecific chronic pain syndrome. He was concerned about the amount of narcotic medication she was taking and recommended a psychological evaluation and a micro-current stimulator to try to reduce her discomfort.

In July and August 2006, respondent began a remodeling project in the facility's library, which included painting and laying new carpet. Claimant testified that she was

involved in the removing from the library the books, furniture and equipment, with help from some of the juvenile residents. By August 7, 2006, the painting and carpeting project was completed, and the desks, tables, chairs, computers, printers, book shelves and books were moved back into the library. Claimant testified there were about 1,300 books in the library that had to be placed back on shelves. She said she would pick books up off the floor, put them in a grocery cart, push them into the library, lift them back out of the cart, and then place them on the book shelves. She also testified that she also helped move desks and equipment. She said that some juvenile residents helped her for about 2 1/2 hours that morning. When she went home that evening she was hurting, but she returned to work the next day.

On August 8, 2006, claimant was again putting books on the shelves and moving equipment. She testified that she cried most of the morning and only worked until lunch because she was hurting. Because claimant's supervisor was unavailable, claimant spoke with Brenda Tietjens, respondent's business manager, and told her that she was hurting, could not work any longer, and needed to go home. She said she was having pain that radiated to her leg from her hip and back and she could barely sit, stand or walk. Claimant testified that she told Ms. Tietjens that her pain had gotten worse from the activities she had performed when she moved the books and equipment. According to respondent's records, claimant worked her full eight-hour shift on August 8 and returned to work on August 9, 2006, but did not work a full shift. Kristie Smith, respondent's human resources manager, testified that her records indicate that claimant worked from 12:30 p.m. to 3:30 p.m. on August 9 and has not returned to work since.

Katrina Pollett, respondent's superintendent and claimant's supervisor, testified that claimant was told she was to direct the juvenile residents as to how to box up the books from the library and tell them where to move them in preparation for the renovation project. After the carpeting and painting were completed, claimant was to direct the juvenile residents and maintenance staff in replacing the equipment and books. Ms. Pollett said that she went to the library two or three times during the renovation project. When there, she saw some juvenile residents loading books into shopping carts and taking them out of the library. She said she never saw claimant performing any lifting, bending or stooping during the times she came to the library during the project.

Ms. Pollett also testified that at some point after August 8, 2006, claimant called and asked for the return of her personal items. Ms. Pollett and her administrative assistant brought the approximately 10-pound box of items to claimant's home. She said claimant met them at the door in a night gown and robe and high heels. Although Ms. Pollett offered to carry the box into the home, claimant took it from her at the door.

Brenda Tietjens was in charge of the library renovation project in 2006. She testified that she arranged for maintenance staff to move the furniture out of the library and to do the painting. Claimant was to supervise the juvenile residents in taking the books out of the library and to place them back in the library when the project was completed. Ms.

Tietjens testified she specifically told claimant she was only to direct the juvenile residents where to put the books and was to have no role whatsoever in moving the books, tables, desks or computer equipment.

Ms. Tietjens remembered speaking with claimant on or about August 8, 2006, but she did not remember claimant saying she had suffered a back injury. She recalled only that claimant said she was hurting and wanted to go home, and she told claimant to go on home.

Robert McCune is respondent's senior maintenance technician. He testified that he and the other members of the maintenance department were assigned to move the book shelves, furniture and equipment from the library and to then paint the room before the carpet was installed. After the carpet was installed, the maintenance crew then moved the shelves, furniture and equipment back into the library. He testified that he did not recall seeing claimant move anything in or out of the library during that time. He said that he and Mike Horn moved "99.9 percent "[2] of the items. He saw some juvenile residents helping take items out of the library. He said that he and Mr. Horn moved some of the books and that claimant was there, but he could not recall if she moved any of the books. Nor did he have any recollection of claimant helping move or set up computers or desks, although she was present when the work was being done.

Mike Horn, a member of respondent's maintenance crew, testified that he was assigned to help with the library project. He moved tables, chairs, and book shelves. Although he said he moved some of the books, he did not take them off the shelves or put them back on the shelves because he did not want to get in trouble if the books got out of order. He saw two or three juvenile residents helping with the moving of the books. He did not see claimant move any books.

Mr. Horn did not see claimant do any of the moving and said most of the moving was done by the maintenance people. However, he said that he remembered seeing claimant one day around 4:30 p.m. sitting in the hallway near the library. He said it was a hot day, and the air conditioner was not working. He said that claimant was sweaty and looked like she had been crying, and she looked at him and said that she had to move all the stuff back into the library. Because it was the end of the day and he wanted to leave, he did not say anything to her.

Claimant testified that before the August 8, 2006, incident, she had been on 80 milligrams of Oxycontin, as well as either Lortab or Percocet, medication to help her sleep, and an anti-depressant. She said that after the August 8, 2006, incident, Dr. Murati increased the amount of medication she was on. She said that Dr. Murati referred her to Dr. Robert Miller, an anesthesiologist, for injections. Dr. Murati also referred her to Dr.

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[2] McCune Depo. at 10.

Doss, who performed several nerve root blocks and, on August 22, 2007, inserted a permanent nerve root stimulator.

Claimant was seen by Dr. Stein again on February 11, 2008, again at the request of respondent, for the purpose of evaluating her condition. Dr. Stein noted that her Oxycontin dosage was double what it had been in March 2006. He reported that she still walked with a slight left-sided limp. Claimant told Dr. Stein she had an increase in her back and leg pain after the August 2006 incident. He noted that her medical records did not make any notation regarding a new injury or significant aggravation in August 2006 and that the only information he had that she had a new injury or aggravation in August 2006 was from claimant herself.

Dr. Stein testified that he saw no evidence to determine within a reasonable degree of medical probability that claimant's permanent impairment had changed because of an incident or work activity in August 2006 or was different compared to what it was in March 2006. Dr. Stein opined that claimant was at maximum medical improvement (MMI) for any previous aggravations and for any aggravation that might have occurred on August 8, 2006. He said claimant would continue to need pain medication. He said that it did not appear to him that the injections she was receiving were very helpful, and he was concerned about the amount of narcotic medication she was taking. He also opined that he did not think she would return to gainful employment because of the amount of narcotic medication she was taking and the amount of pain she was reporting.

Dr. George Fluter is board certified in physical medicine and rehabilitation. He examined claimant on June 4, 2008, at the request of her attorney. She gave him a pre-1999 accident history of no low back problems. She had surgery on her left knee on December 8, 1999, after which she used crutches for approximately 6 months and was in a brace for approximately 1 1/2 years. She told him she developed complex regional pain disorder several months after her surgery. She estimated that she has been treated with more than 40 interventional procedures. She said the procedures provided temporary benefit at best, generally only as long as the local anesthetic duration. She underwent lumbar spine fusion in June 2002 and had some benefit for approximately 8 months but then had gradually increasing pain. She had a number of additional interventional procedures, including Botox injections in the low back, Synvisc injections to the left knee, and a spinal cord stimulator. Claimant told Dr. Fluter she aggravated her low back when she was replacing books on book shelves in August 2006 and has not been able to return to work since.

After Dr. Fluter examined claimant, he diagnosed her with left knee internal derangement, development of left lower extremity complex regional pain disorder, degenerative disc disease of the lumbar spine, and chronic low back pain with aggravation on August 2006. Based upon the available information, Dr. Fluter opined that within a reasonable degree of medical probability, there was a causal/contributory relationship between claimant's current condition and the reported injury of October 26, 1999, and its

sequelae with aggravation of the low back condition from work-related activities in August 2006. Dr. Fluter testified that claimant's low back aggravation in August 2006 was a soft tissue aggravation as opposed to an alteration in the structural status of her spine. He said it was possible that the soft tissue injury could have occurred absent her preexisting back condition, but the underlying structural condition would have increased the likelihood of an aggravation.

Based on the AMA *Guides*, Dr. Fluter rated claimant as being in DRE lumbosacral Category V, having a 25 percent permanent partial impairment to the whole body after the August 2006 injury. He opined that she had a 5 percent impairment as a result of the exacerbation of the low back condition that occurred in August 2006.

Dr. Fluter said the nature of claimant's impairments would support restrictions in the sedentary level of physical demand. However, he further opined that her impairments have affected her ability to perform basic and advanced activities of daily living and that she does not have the capacity to perform even sedentary level work activities on a regular and consistent basis. He testified that in his opinion, claimant was not capable of returning to gainful employment. Her lifting should be restricted to lifting, pushing or carrying 10 pounds on an occasional basis and negligible weight on a frequent basis. In general, most of her activities should be done while sitting. He also believes she would need to be able to lie down in the course of a day. Dr. Fluter reviewed a task loss list prepared by Jerry Hardin for the tasks claimant performed in the 15-year period before the August 2006 incident. Of the 52 nonduplicated tasks on that list, he opined claimant would be unable to perform 21 for a 40 percent task loss.

Dr. Stein saw claimant a third time on October 17, 2008, at respondent's request, for the purpose of providing a diagnosis and opinion relative to impairment, restrictions and causation. Claimant told him she thought her condition was progressively getting worse. She started having problems with her right ankle and continued to have all her old complaints. She said her back pain was moving towards the right side. She also complained of neck pain. She was continuing to take a substantial amount of medication, although her Oxycontin had been reduced from 160 milligrams twice a day to 110 milligrams twice a day.

Dr. Stein believed that claimant's diagnosis continued to be chronic low back pain with failed lumbar surgery related to the October 26, 1999, injury. He believed she had nonspecific chronic pain syndrome likely with underlying psychological factors contributing to her symptomatology. He again stated that there was no evidence of a structural injury as a result of anything that occurred on August 8, 2006. He opined that her current symptoms were a progression of the original injury and pathology and that there were psychological factors involved.

Based on the AMA *Guides*, Dr. Stein placed claimant in DRE Category IV for a 20 percent whole person impairment. He stated that this impairment was present from the

1999 injury and surgery and pre-dated August 2006. He found no indication that claimant had any additional impairment on an objective basis from the August 2006 incident. He believes that claimant has real pain but does not think it is as severe as she thinks it is on a physical basis.

Dr. Stein testified that if he was to take only her complaints, she would be essentially incapacitated or hardly able to do anything, including not being able to return to work. In giving her restrictions, he tried to blend her complaints with his physical examinations and her pathology. In doing so, he recommended she avoid lifting more than 20 pounds with any single lift up to twice a day, 10 pounds occasionally and no frequent lifting. She should not lift from below knuckle height or above chest level. She should do no repetitive bending or twisting of the low back. She should have the opportunity to alternate sitting, standing and walking as needed. She should have the opportunity to lie down if necessary one hour twice in an eight-hour workday, or should limit her workday to four hours. She should not operate dangerous equipment while under the influence of narcotic medication. But Dr. Stein did not think that the amount of narcotic medicine claimant was taking would make her unemployable because she was probably acclimated to the narcotics. He thought she would be able to perform ordinary job activities

Dr. Stein did not recommend any new treatment for the back. Again, he recommended a psychological evaluation to try to reduce her narcotic medication. He said that he has concerns because claimant has a lot of symptomatology that has no physical basis. He said that when dealing with chronic pain syndrome, it is not unusual for the symptoms to progress. But he opined that the only true objective physical structural injury occurred in 1999.

Dr. Stein reviewed the task loss list prepared by Dan Zumalt. He first looked at the task list for the 15-year period before her October 1999 accident. Of the 58 nonduplicated tasks on that list, Dr. Stein opined that claimant was unable to perform 27 for a 47 percent task loss. Dr. Stein also looked at the task loss for the 15-year period before the August 8, 2006, accident, which included claimant's jobs for respondent in the commissary and library, as well as her job with Bell Memorial. Of the 68 nonduplicated tasks on that list, Dr. Stein opined that claimant was unable to perform 36 for a task loss of 53 percent.

Jerry Hardin originally met with claimant on August 11, 2004, at the request of claimant's attorney. He prepared a report and task list relative to claimant's 1999 injury.

Mr. Hardin met with claimant a second time on July 28, 2008, again at the request of claimant's attorney. In his July 28, 2008, interview with claimant, Mr. Hardin went over her subsequent employment since his last evaluation, her subsequent injury in 2006, and the doctors' restrictions. Together they prepared task lists for the 15-year period before her injury in 1999, with additional tasks lists for those jobs she performed after 1999 but before her 2006 injury.

Mr. Hardin testified that upon reviewing Dr. Stein's reports, it is his opinion that claimant is essentially and realistically unemployable. He said that she is unable to obtain or perform substantial, gainful employment and should be on Social Security disability. He based this opinion particularly on Dr. Stein's February 11, 2008, report, but he also noted that Dr. Fluter believed that claimant was not capable of returning to gainful employment. Mr. Hardin thought claimant would have trouble working because of her pain and also that attendance would be a problem. He also said there would be no jobs in the open labor market where claimant would be able to lie down 30 minutes in the morning and 30 minutes in the afternoon.

Dan Zumalt, a vocational rehabilitation consultant, met with claimant on October 27, 2008, with follow up telephone interviews on November 3 and November 4, 2008, at the request of respondent. He prepared a list of 68 nonduplicated tasks that claimant performed in the 15-year period before her injury in August 2006.

Mr. Zumalt utilized the restrictions set out by Drs. Stein and Fluter and concluded that claimant would be able to perform the duties of a surveillance system monitor, which paid from $11.09 to $11.83 per hour. He used the average of those figures and opined that claimant would be capable of earning a post-accident wage of $11.46 per hour. He said he would add $1.46 per hour for fringe benefits, giving claimant a potential post-injury average weekly wage of $516.80. This would be more than claimant earned in both 1999 and 2006. He identified 80 surveillance system monitor positions in the claimant's work area, which he identified as Local Area 1, a 62-county area. He agreed that as a practical matter, however, a person would not travel 2 1/2 hours to work for an $11.46 per hour job.

Ms. Smith wrote claimant on May 16, 2008, noting that Dr. Stein had found claimant to be at MMI. The letter informed claimant that respondent would accommodate her restrictions and notified her that she should return to her regularly assigned shift on May 21, 2008. In a letter to respondent's attorney dated June 20, 2008, claimant's attorney said that claimant was not able to return to work. Ms. Smith wrote claimant again on July 31, 2008, asking her to return to her job as an administrative assistant. She included a copy of the position description to let claimant know the job was predominately sedentary. The letter indicated that Ms. Smith needed to know by August 15 if claimant accepted or rejected the offered position. Respondent's attorney received a letter from claimant's attorney dated August 6, 2008, wherein he stated that claimant would be willing to accept the job as administrative assistant subject to being released to return to work by her authorized treating physician. In a letter dated August 14, 2008, claimant's attorney again wrote respondent's attorney saying that claimant was ready, willing and able to return to the accommodated position offered provided she has been released to return to work by her authorized treating physician, but stating that her treating physician, Dr. Murati, had not released her, nor had she been released by Dr. Stein.

Respondent sent a follow-up letter to claimant dated August 25, 2008, signed by Katrina Pollett, as respondent had not received any information from claimant as to her

intent to accept or reject the offer to return to the position. The August 25 letter again set out claimant's restrictions from Dr. Murati and told her that respondent would accommodate the restrictions and that she should return to her position on August 28. Claimant did not return to the position. It was Ms. Smith's understanding that claimant would accept the position subject to a release from her authorized treating physician.

On August 28, claimant called Ms. Pollett and told her that the matter had been resolved and that Ms. Pollett should talk to claimant's attorney. State regulations are that if someone is a no-show/no-call for five days, it is considered job abandonment. Respondent then started a five-day process to notify claimant that she needed to return to her position. Claimant was sent letters on August 28, August 29, September 2, September 3 and September 4 serving notice that she was to return to her regularly assigned shift. A final letter was sent on September 5, which gave claimant 10 days, until September 15, to report to work or provide an explanation for her continued absence. Ms. Smith received a letter from claimant dated September 11, received September 15, stating that she would be willing to return to work but was unable to do so because she had not been released by her doctor.

There apparently has been some argument between the parties as to whether it is claimant's responsibility to seek out a return to work release, or if that should be the responsibility of respondent. Ms. Smith testified that it was claimant's responsibility to seek out a return to work release. Both Ms. Pollett and Ms. Smith testified that respondent was prepared to accommodate claimant's restrictions, including offering her a position where she would only have to work four hours per day.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

Claimant is seeking modification of her Award in Docket No. 1,009,450. An award may be modified when changed circumstances either increase or decrease the permanent disability. The Workers Compensation Act provides, in part:

> (a) Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be

> reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.
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> . . . .
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> (d) Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.[3]

In a review and modification proceeding, the burden of establishing the changed conditions is on the party asserting them.[4] Our appellate courts have consistently held that there must be a change of circumstances, either in claimant's physical or employment status, to justify modification of an award.[5]

In Docket No. 1,030,997, claimant is alleging she suffered a new injury on August 8, 2006. Respondent argues that any aggravation or increase of symptoms was a natural consequence of claimant's previous accident and injury in Docket No. 1,009,450. The natural consequence rule applies to a situation where a claimant's disability gradually increases from a preexisting compensable injury and not when the increase in disability results from a new and separate accident.[6]

In general, the question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers

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[3] K.S.A. 44-528.

[4] *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979).

[5] See, *e.g., Gile v. Associated Co.*, 223 Kan. 739, 576 P.2d 663 (1978); *Coffee v. Fleming Company, Inc.*, 199 Kan. 453, 430 P.2d 259 (1967).

[6] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P.2d 697 (1973).

compensation turns on whether claimant's subsequent work activity aggravated, accelerated or intensified the underlying disease or affliction.[7]

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson,*[8] the court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman,*[9] the court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig,*[10] the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

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[7] *See Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

[8] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[9] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[10] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

In *Graber,*[11] the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."[12]

In *Logsdon*,[13] the Kansas Court of Appeals reiterated the rules found in *Jackson* and *Gillig*:

> Whether an injury is a natural and probable result of previous injuries is generally a fact question.
>
> When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.
>
> When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

Finally, in *Casco*,[14] the Kansas Supreme Court states: "When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury."

Claimant has never been symptom free since her accident of October 26, 1999. Her symptoms on August 8, 2006, were to the same parts of her body as before. She did not experience new symptoms but, instead, experienced a worsening of her symptoms. Dr. Stein examined claimant both before and after the August 8, 2006, incident. He found no structural changes and no permanent increase in her functional impairment. His opinions support a finding that the August 2006 incident was a natural consequence of the October 26, 1999, accident. This was the finding by the ALJ, and the Board agrees.

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[11] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[12] *Id.* at 728.

[13] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006); see also *Leitzke v. Tru-Circle Aerospace*, No. 98,463, unpublished Court of Appeals opinion filed June 6, 2008.

[14] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007).

Claimant contends she is permanently and totally disabled as a result of her injuries. K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[15]

In *Wardlow*[16], the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

The court in *Wardlow* looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

Both Dr. Murati and Dr. Fluter opined that claimant does not have the capacity to perform even sedentary work on a regular basis. Dr. Stein equivocated about the effects of the narcotic medication on claimant's ability to perform work tasks. The vocational experts were divided on this point. Mr. Hardin is of the opinion that claimant was not capable of returning to substantial, gainful employment. Mr. Zumalt believes there are some jobs, such as a surveillance system monitor, that claimant could do.

The Board finds claimant is now realistically unemployable as a direct consequence of her October 26, 1999, accident. Her restrictions severely limit her employment opportunities. When the effects of the narcotic pain medications are also considered, realistically there are no positions she can perform full time. Although respondent was willing to accommodate claimant with part time work, most likely claimant could not perform

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[15] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[16] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

that job. Furthermore, such part time work would not constitute substantial, gainful employment as contemplated by the statute.

CONCLUSION

(1) Claimant's injury on August 8, 2006, was a direct and natural consequence of her injury of October 26, 1999, that arose out of and in the course of her employment with respondent.

(2) Because of the Board's conclusion in issue 1, this issue is moot.

(3) Claimant is now permanently and totally disabled as a result of her injuries in Docket No. 1,009,450.

(4) The effective date for the review and modification of the Award in Docket No. 1,009,450 is October 10, 2007, which is six months prior to the date claimant filed her Application for Review and Modification with the Division.[17] The Review and Modification Award states that as of February 19, 2009, claimant was entitled to 70.14 weeks of permanent total disability compensation when, in fact, claimant would have been entitled to 71.14 weeks of permanent total disability compensation on that date. All other calculations were correct.

Although the ALJ found claimant's attorney fee retainer to be reasonable, the record does not contain a filed fee agreement between claimant and her attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the Director for appropriate approval.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award in Docket No. 1,030,997 entered by Administrative Law Judge Bruce E. Moore on February 19, 2009, is affirmed. Further, it is the finding, decision and order of the Board that the Review and Modification Award in Docket No, 1,009,450, is also affirmed, except that permanent total disability compensation should commence on October 10, 2007, rather than October 17, 2007.

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[17] Claimant filed her Application for Review and Modification on April 10, 2008. In the Review & Modification Award filed February 19, 2009, page 5, the ALJ erroneously states that the claimant's Application for Review and Modification was filed on April 16, 2008.

Claimant is entitled to permanent total disability compensation at the rate of $269.73[18] per week not to exceed $125,000, for a permanent total general body disability. This Award will be less amounts previously paid of 78.14 weeks of temporary total disability benefits plus permanent partial compensation of a 25 percent functional impairment plus 10.71 weeks of work disability, for a total of $49,735.52. Credit shall also be given for 76.15 weeks of temporary total disability benefits paid in Docket No. 1,030,997 in the amount of $20,296.28.

As of July 24, 2009, there would be due and owing to claimant 93.29 weeks of permanent total disability compensation at the rate of $269.73 per week, for a total due and owing of $25,163.11, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $29,805.09 shall be paid at $269.73 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of July, 2009.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: James S. Oswalt, Attorney for Claimant
E.L. Lee Kinch, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

[18] The stipulated gross preinjury average weekly wage is $404.58 without fringe benefits and $466.57 with fringe benefits. The corresponding compensation rates are $269.73 and $311.06 respectively. The record does not contain a date that the fringe benefits were discontinued or show if, in fact fringe benefits are continuing to be paid by respondent.